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POLICY FORMULATION OF CRIMINAL LAW ON ILLEGAL POSSESSION OF FIREARMS IN CRIMINAL LAW REFORM IN INDONESIA

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Abstract:

Background. Firearm abuse is the most common case today.

Aim. The flow of crime using the threat of violence or with firearms is indeed very disturbing to public security and order, causing concern in the community.

Methods. This research uses normative juridical legal research, which has a descriptive nature, meaning it is based on laws and regulations closely related to the problem being researched, sourced from facts in society, and secondary literature or data.

Results. Firearms for ordinary people are objects/tools used to attack or defend themselves, which, if fired, can cause serious injury or death, and one of the crimes that most disturbs the community is the crime involving the use of firearms.

Conclusions. The current policy of criminal law formulation, especially regarding the current Illegal Firearms Possession Crime Formulation Policy, has many fundamental weaknesses, that it affect the level of effectiveness in the implementation of the eradication of the crime of Illegal Firearms Possession

Involvement. Criminal law policy aimed at eradicating the crime of illegal firearm possession in the future should include the qualification of delicacy, as well as provide an understanding of juridical limitations regarding "malicious conspiracy" and "recidivism."

Keywords: Policy Formulation, Illegal Firearms Ownership, Law Reform.

INTRODUCTION

The use of firearms by civilians can be diminished if security is assured, necessitating a collaborative effort between authorities and the populace. Concerning the distribution of illegal firearms, they may manifest as misappropriated weapons by law enforcement personnel or as built firearms. The proliferation of illicit firearms poses significant dangers as these weapons are manufactured, trafficked, and employed in criminal activities. The movement of both legal and illegal firearms within the community necessitates stringent oversight and prompt regulation by relevant authorities, such as the Police, to prevent potential abuse that could result in further victims.

The formulation policy in criminal law is a criminal law enforcement policy, It is said that the criminal law enforcement policy is a series of processes consisting of:¹

1. Legislative/formative policy stage;
2. Judicial/applicable policy stage; and
3. Executive/Administrative Policy Stage.

The formulation policy is a measure implemented by the state to delineate behaviors deemed immoral and thereafter employ criminal legislation as a means to deter and prohibit these actions, thereby motivating individuals to abstain from committing them. Criminal law is implemented by the establishment of rules and regulations that explicitly include criminal punishments. This aligns with Barda Nawawi Arief's previous assertion that legislative policy involves the determination and formulation of laws. Legislative policies are frequently termed "formulaic policies."²

The use of criminal law as a means to address crime must be meticulously planned and accurately formulated, as the ultimate objective of criminal law is to promote the welfare of the community. The well-being of this community reflects the well-being of the broader

¹ Barda Nawawi Arief, , *Some Aspects of Criminal Law Enforcement and Development Policy*, (Bandung: Citra Aditya Bakti, 2005), p. 30.

² Barda Nawawi Arief in Barda Nawawi Arief and Muladi, *Bunga Potpourri Criminal Law Policy Development of the Drafting of the New Criminal Code Concept*, (Jakarta, Kencana Prenada Media Group, 2011), p. 213.

society; it is not merely about incarcerating the offender and exacerbating the issue of overcrowded prisons.

The application of legal remedies, encompassing criminal law, constitutes one of the key strategies for addressing social issues within law enforcement policy. Furthermore, given that the objective is to enhance the collective welfare of society, this law enforcement strategy is regarded as an element of social policy, embodying a systematic endeavor to achieve community well-being.³

This indicates that, throughout the policy design phase, the selection of criminal law sanctions to address offenses should be conducted judiciously, encompassing the type of sanction, its duration, and the method of implementation. Irrational policy-making will generate its issues, specifically the rise of criminogenic elements.

Legislative policies or formulations in criminal law enforcement do not need to be consolidated into a single legal compendium. It can be articulated in numerous statutes that already exist, encompassing substantive criminal laws within and beyond the Criminal Code, procedural criminal laws within and beyond the Criminal Code, and laws governing criminal execution.⁴

Based on the description above, several study formulations can be formulated in this paper:

1. What is the policy of criminal law formulation regarding illegal firearms ownership today?
2. How is the formulation of the criminal law on illegal firearm ownership in the reform of the criminal law?

METHOD

The research method is a stage in carrying out a research activity, as it can later be used to carry out the research function, where the research function is to obtain the truth. A truth must be sourced from science, that is, from where the source of knowledge is obtained, whether the source of knowledge is reliable or not. Thus, without a research method, the researcher will never get the sources of knowledge in his research, so that the truth sought as the function of the research itself will never be found.

³ Barda Nawawi Arief, *Legislative Policy in Crime Prevention with Prison Sentences*, (Yogyakarta: Genta Publishing, 2010), p. 17.

⁴ Barda Nawawi Arief, *Some Aspects of Criminal Law Enforcement and Development Policy*,... p. 31.

In legal research, there are two primary approaches: empirical legal research and normative legal research. This research employs normative juridical legal research, which has a descriptive nature, meaning it is based on laws and regulations closely related to the problem being researched, sourced from actual societal facts, and secondary literature or data. The author's approach is based on laws and regulations, theories, legal principles, legal doctrines, and relevant literature in Indonesia.

RESULTS AND DISCUSSION

The policy of formulating criminal law on illegal firearms possession is currently in place.

The Criminal Code categorizes criminal offenses into two classifications: felonies and misdemeanors. The offenses outlined in the crime are stated in Book II, while those included under the offense are detailed in Book III. Nonetheless, the Criminal Code does not specify the criteria used to distinguish between the two categories of offenses. The distinction between offense and crime is based on the difference between a criminal act and a breach of legal statutes.

A crime constitutes a legal infraction, whereas a violation represents an infringement of the law. A crime is an act that contravenes the law, while a violation is an act designated by the law as detrimental to public order.⁵

Sudarto asserts that the grounds for differentiating between the two aforementioned sorts of offenses are grounded in the notion of qualitative distinctions between them. The two categories of offenses known as crimes or "rechtdelicten" are actions that violate justice, irrespective of their legal criminalization. The second category of infraction, referred to as "wetsdelicten," is deemed a criminal conduct only due to its designation by law, which imposes a criminal penalty for such actions.

Van Bemmelen asserted that the distinction between crime and offense is not qualitative but quantitative; specifically, crimes are generally subject to more severe penalties than violations of the Criminal Code. Crimes are delineated in Book I of the Criminal Code, whilst breaches are specified in Book II of the Criminal Code. The provisions pertaining to Book II of the Criminal Code concerning crimes are detailed as follows:⁶

⁵ Abdul Wahid, et al., *Terrorism Crimes From a Religious, Human Rights and Legal Perspective*, (Bandung, PT. Refika Aditama, 2004), p. 53.

⁶ Anonymous, *Criminal Code and Criminal Code*, (Bandung, Citra Umbara, 2006), pp. 35-154.

The Indonesian Criminal Code follows the monistic school, which posits no distinction between criminal acts and criminal liability. However, in practice and development, a clear distinction exists between the two, as articulated by Sudarto regarding the monistic perspective. "The monistic perspective posits that all conditions requisite for the existence of a crime pertain solely to the nature of the act." This perspective outlines the concepts of comprehension for criminal acts, encompassing both prohibited actions (criminal acts) and criminal liability/errors (criminal responsibility).⁷

The authors of the Criminal Code (W.v.S) concur that legal entities are incapable of committing criminal offenses and that only natural persons can engage in such conduct. Conversely, legal entities (rechts persoon) are incapable of perpetrating criminal offenses. Ultimately, it becomes evident that natural human people collaborate to establish a commercial sector in the shape of an organization. The advancement of science and technology has facilitated economic progress, leading to the rise of corporate entities that encompass both individuals and organized corporations, consolidating their resources and expertise. This corporation is unequivocally focused on profit in its operations. Consequently, it is feasible to undertake acts that may adversely affect others in the pursuit of one's objectives.⁸

In Indonesia, the acknowledgment of companies as entities subject to criminal law is presently confined to criminal law regulations external to the Criminal Code or administrative laws that enforce criminal penalties. Nonetheless, there remains an inconsistency in the legal framework about the recognition of businesses as legal entities capable of accountability. The incompleteness pertains to the circumstances in which a corporation is deemed accountable or liable.

The legal ramifications of failing to regulate companies as subjects of criminal crimes under Book I of the Criminal Code, specifically regarding their governance under laws external to the Criminal Code, are highly varied. Emergency Law No. 12 of 1951 regarding the possession of firearms, ammunition, explosives, and other weapons solely imposes criminal obligation on its administrators, as articulated in Article 4, paragraph (1), which states:

⁷ Sudarto, *Criminal Law I*..., pp.31-32.

⁸ Nyoman Serikat Putra Jaya, *Law and Criminal Law in the Field of Economics*, (Semarang, Dipenogoro University, 2012), pp. 29-30.

If an act punishable under this Emergency Law is perpetrated by or on behalf of a legal body, prosecution may be initiated and penalties imposed on the management or its local agent.

The Criminal Code serves as a primary framework of substantive criminal law that fails to acknowledge corporate criminal liability, resulting in legal complications. Conversely, special legislation containing criminal provisions, which constitutes a subsystem of substantive criminal law, recognizes that corporations are subject to legal accountability. However, it is regrettable that many of these special laws lack comprehensive guidelines and penalties applicable to corporations:⁹

1. Affirmation of corporations as legal subjects of criminal acts
2. Determination of criminal sanctions/actions for corporations
3. Determining who can be held accountable
4. Determination of when the corporation can be held accountable
5. Determination of when the manager can be held accountable
6. Determination of justifiable and forgiving reasons for corporations
7. Determination of penal rules/guidelines for corporations

This can cause juridical problems because the Criminal Code, which is the parent system of material criminal law as explained above, does not recognize criminal liability for corporations. Emergency Law No. 12 of 1951 on firearms also does not regulate liability for corporations.

The first and second problems (Criminal Acts and Mistakes) have been the topic of discussion on various occasions. Still, the third problem, namely criminality, appears to be a stepchild in the debate on criminal law, even though this punishment plays a crucial role in achieving the goals of criminal law.

The Criminal System fundamentally serves as an authority to enforce laws against criminal behavior. The term "criminal" is significant not just in a restricted or legal context but also in a broader or material context. In a narrow and formal sense, the penal system refers to the authority to impose criminal sanctions in accordance with the law by an authorized official (judge). In a broader and material sense, the penal system encompasses a series of legal actions conducted by authorized officials, beginning with the investigation

⁹ Barda Nawawi Arief, *Policy of Formulation of Criminal Provisions in Laws and Regulations*, (Semarang, Pustaka Magister, 2012), p.121.

process, proceeding to prosecution, and culminating in the criminal verdict issued by the court and executed by the enforcement apparatus.

According to the aforementioned description of the penal system, it can be asserted that all laws and regulations under the Criminal Code, along with specific legislation external to the Criminal Code, constitute components of the criminal system. The Criminal System, as delineated in the Law, is fundamentally an authority structure for the imposition of criminal sanctions.¹⁰

There are two penalties: the punitive guidelines and the penal rules. The distinction between penal guidelines and penal rules lies in the fact that penal guidelines are not incorporated within the Criminal Code, while penal rules are delineated in Article 53 of the Criminal Code. The duration of a criminal trial is diminished by one-third. Nonetheless, the overarching conceptual framework is absent from the Criminal Code and is instead located within legal doctrine and jurisprudence. Nonetheless, due to its absence in the Criminal Code, the overarching conceptual framework is frequently overlooked, despite being "prohibited" in practice or judicial rulings.

The objective and rules of punishment may be disregarded, missed, or forbidden due to their absence in the Criminal Code. From the system's standpoint, the concept of "goal" is vital and fundamental. This objective embodies the essence of the punitive system.¹¹

Emergency Law No. 12 of 1951 stipulates that the penal provisions concerning firearms, ammunition, explosives, and other weapons are applicable in the same manner as those in the Criminal Code, including death penalty, imprisonment, fines, and confinement, unless explicitly stated otherwise in the law. Consequently, the penal restrictions are clearly applied (*lex specialis derogat legi generalis*).

The delineation of criminal penalties in Emergency Law No. 12 of 1951 for the possession of firearms, ammunition, explosives, and other weaponry is distributed over multiple articles including:

Article 1 paragraph (1)

Any individual who, lacking authorization to enter Indonesia, engages in the manufacture, receipt, acquisition, surrender, possession, transportation, concealment, utilization, or

¹⁰ Barda Nawawi Arief, *Policy on the Formulation of Criminal Provisions in Laws and Regulations*, p. 23.

¹¹ Barda Nawawi Arief, *Some Aspects of Criminal Law Enforcement and Development Policy*, (Bandung, Citra Aditya Bakti, 1998), p. 114.

removal of any firearm, ammunition, or explosives shall be subject to the death penalty, life imprisonment, or a maximum term of twenty years' imprisonment.

Policy on the Formulation of Criminal Law on Illegal Firearms Possession in Criminal Law Reform

To determine the future formulation policy, the author uses a comparative study including the Criminal Code and the Concept of the 2012 Criminal Code

- **Draft of the 2012 Criminal Code on the Possession of Firearms, Ammunition, Explosives, and Other Weapons**

Article 294

Every person who without the right to enter into the territory of the Republic of Indonesia, makes, receives, attempts to acquire, surrender or attempts to surrender, control, carry, possess, store, transport, hide, use, or remove from the territory of the Republic of Indonesia firearms, ammunition, explosives, or other dangerous materials, tear gas, or rubber bullets, shall be sentenced to imprisonment for a minimum of 3 (three) years and a maximum of 3 (three) years 15 (fifteen) years.¹²

¹²

- **Criminal:**

1. Juridical qualification between crime and violation

The 2012 illegal Code Draft omits any provisions regarding offenses that may lead to legal complications in practical law application, as well as during trials, aid, and collaboration in illegal activities. In the chapter on criminal provisions, there must be a stipulation about the legal classification of a criminal act as either a crime or an offense.

2. Conspiracy and recidivism

The offense of Malicious Conspiracy is governed by Article 110, paragraphs (1) to (4) of the Criminal Code. Malicious consensus, which is explicitly governed, pertains solely to offenses delineated in Articles 104, 106, 107, and 108 of the Criminal Code. This indicates that the offense of Malicious Conspiracy does not apply to all criminal acts within the Criminal Code, rendering it unique, as stated in Article 110 of the Criminal Code. Article 88 of the Criminal Code provides a genuine interpretation of the term of wicked consensus. Article 88 defines malevolent consensus as follows: "A malicious consensus exists when two or more individuals have conspired to commit a crime or to conceal a crime."

¹² Sudarto, *A Dilemma in the Reform of the Indonesian Criminal System*, (Semarang, Sudarto Foundation, Faculty of Law, Undip, 1979), p. 5

Although the illegal conduct has not been executed, it does not imply that the malevolent conspiracy equates to the criminal offense of attempt as delineated in Article 53 of the illegal Code. The criminal act of probation requires three elements: purpose, commencement of execution, and the act remains incomplete beyond the perpetrator's control. If you look at the formulation of the criminal act of malicious consensus, then the intention in the malicious consensus can be punished. The act of preparation in the malevolent consensus is not yet extant.

The Criminal Code's Concept lacks specific provisions addressing criminal acts executed with malicious intent or recidivism, resulting in complications, as the penal regulations are intended not only for the individuals perpetrating criminal acts but also for those engaging in malicious collusion and repeated offenses.

Analysis of the upcoming Criminal Code Concept according to the author:

To establish the concept of future KKUP, the legal classification of firearm possession must distinctly differentiate between crimes and infractions to prevent legal complications in its enforcement. Additionally, there must be elements of malicious collusion (samenspanning, conspiracy) and recidivism, along with components pertaining to corporate liability. A lack of clarity in these areas may lead to conflicts, particularly as the current Emergency Law, as posited by the author, is no longer applicable due to its overly broad explanations.

CONCLUSION

Conclusion

1. The current policy formulation of criminal law, especially regarding the current Illegal Firearms Possession Crime Formulation Policy, has a number of fundamental weaknesses, so that it affects the level of effectiveness in the implementation of the eradication of the crime of Illegal Firearms Ownership, because weaknesses in the formulation stage (*in abstracto*) are strategic weaknesses for the next stage, namely the application and execution stage (*in concret*). The weaknesses of the current formulation of the crime of Illegal Firearms Possession are as follows:
 - a. The criminal law policy in the case of the crime of Illegal Firearms Possession that is currently in force, the act of listing the qualification of the offense whether it is a "violation" or a "crime". In addition, it also does not provide a

definition or juridical limitations regarding "malicious consensus", and "repetition of criminal acts (*recidive*)".

b. Given the significant repercussions of corporate crime on society, the economy, the government, and other perilous dimensions, which may surpass those of traditional crime, it is imperative to establish consistency and a robust legal framework to enforce criminal liability on corporations. Furthermore, a more comprehensive examination is required among scholars, practitioners, and law enforcement personnel to establish a theoretical foundation for corporate criminal culpability. This must also be complemented by initiatives to enhance the proficiency and capabilities of law enforcement personnel responsible for its implementation. They must possess the capability and ingenuity to achieve legal advancements.

3. Taking into account these weaknesses, it is better to update the criminal law policy regarding the crime of Illegal Firearms Possession for the future, paying attention to the following matters:

- The formulation of the criminal act of Illegal Firearms Possession still emphasizes the elements of providing a juridical understanding of "Malicious intent" and "repetition of criminal acts" (recidivism), which are based on the Criminal Code as the source of the parent legal system.
- The formulation of the crime of illegal possession of firearms must have a synchronization between criminal liability, criminal and criminal liability crimes that are clearer and more concrete by paying attention to comparative studies of foreign countries (UK, India, and Thailand) and the concept of the 2012 Draft Criminal Code as a benchmark.

INVOLVEMENT

Suggestion

Based on the conclusions as outlined above, the author recommends the following:

1. Criminal law policy in terms of eradicating the crime of illegal firearm possession in the future needs to include the qualification of delicacy, as well as provide an understanding of juridical limitations regarding "malicious conspiracy" and "*recidivism*".

2. The maximum threat system in particular must also contain provisions on the penal guidelines for the maximum threat system specifically including criminal aggravation in the form of fines and severe sanctions

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